ZERO-SUM MADISON

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PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM. By *Jennifer Nedelsky*. Chicago: University of Chicago Press. 1990. Pp. xiii, 343. $29.95.

Has the fabric of American constitutional law been permanently "distorted" by the Framers' preoccupation with protecting private property against redistribution? Jennifer Nedelsky[1] thinks so. In this provocative study of how the idea of property shaped the political thought of the Framers and the institutions they designed, she argues that James Madison's constitutional philosophy was driven by fear that a future propertyless majority would seek to expropriate the holdings of a minority. To combat this danger, Madison sought to create a structure of government that would ensure the dominance of the propertied elite. Madison's obsessive fear of redistribution spread to the newly created federal judiciary, which elevated private property to the status of a legal "boundary" limiting the political power of majorities. Although judicial protection of property has waned in recent decades, Nedelsky believes that Madison's legacy continues to limit our ability to construct a more egalitarian and participatory constitutional order.

Nedelsky's thesis suffers from a double hyperbole: she both overstates and understates the role of property in American public life. In explaining the past, she overstates the extent to which a constitutionalized property has served as a barrier to a more communitarian or egalitarian polity. Indeed, much of her analysis rests on a play on what it means to "redistribute property." Although the historical record reveals that Madison wanted the Constitution to protect specific rights in property and contract from retroactive impairment, it does not support the far more drastic proposition that Madison thought property in the sense of shares of general wealth should be frozen. The dominant pattern in judicial protection of property has similarly been to require government compensation for interference with "distinct investment-backed expectations,"[2] but not to bar efforts to redistribute general wealth. Thus, constitutionalized property has at most impeded attempts at targeted interference; it has not posed any barrier to systemic redistribution.

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In the evaluative chapter that concludes the book (pp. 203-76), on the other hand, Nedelsky badly understates the positive contributions private property makes, especially its role in generating greater material wealth. This chapter is devoid of any acknowledgment of the powerful utilitarian case for a system of private property. The omission is especially glaring given that utilitarian considerations weighed heavily in the minds of Madison and his fellow Federalists as they tried to correct the deficiencies of the Articles of Confederation. Nedelsky's failure to consider the additional material prosperity introduced by a system of private property means that, if anything, her own account of the Madisonian Constitution is "distorted": constitutional protection for private property is far easier to attack in a zero-sum society than in a world where private property creates incentives that encourage a better life for all. A more balanced assessment would view property as a more modest barrier to majoritarian action and more generously credit the institution's positive contributions.

I

Nedelsky tells a story that is carefully developed, attentively detailed, and thoughtfully supported. Especially in the foundational chapters devoted to the political thought of Madison (pp. 16-66) and two other prominent Federalists — Gouverneur Morris (pp. 67-95) and James Wilson (pp. 96-140) — she presents a richly textured account of the Federalist understanding of property and its relation to democratic theory. What follows is necessarily a simplified version of her argument, designed to highlight my points of disagreement.

In Nedelsky's view, the single most important aspect of Madison's political philosophy — and the key to understanding the undemocratic features of our Constitution — is the little-known fact that he was a Malthusian (pp. 18, 33-34, 54-55). Madison believed that as the population of America grew and the vast expanses of the West filled up, eventually large numbers of people would be forced off the land into positions of wage labor.[3] Competition among these landless laborers would drive wages down to the point where "a great majority of the people will not only be without landed, but any other sort of, property."[4]

Given this gloomy prospect, Madison foresaw serious conflict ahead between the political rights of the propertyless majority and the civil rights of minorities, especially their right to private property. Sooner or later, the majority would seek to use its political power to

3. *See* Letter from James Madison to Nicholas P. Trist (Jan. 29, 1828), *reprinted in* MARVIN MEYERS, THE MIND OF THE FOUNDER 453-55 (1973) (criticizing utopian communities such as Owen's New Harmony for overlooking the Malthusian dynamic).

4. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 203-04 (Max Farrand ed., 1911) (statement by Madison).

plunder the property of the wealthy few. Nedelsky suggests that Madison was particularly concerned about the expropriatory yearnings of the future Malthusian mob because he thought it would spell the doom of all civil liberties (p. 38). Madison believed that unequal shares of property resulted ultimately from unequal faculties for obtaining property (such as intelligence and industry) (pp. 28-29), and thus egalitarian redistribution could be achieved only by suppressing free exercise of the faculties themselves (p. 38).

In one of the book's strongest sections, Nedelsky develops the various strategies that Madison might have adopted for staving off the confrontation between majority rule and private property (pp. 141-63). Madison's solution, according to Nedelsky, was to try to rig the rules of majoritarian politics under the Constitution to ensure that those who actually ruled would be members of the property-owning elite (pp. 50-52). This explains Madison's desire for property qualifications for electors to the Senate, his endorsement of a Council of Revision composed in part of unelected judges, and his development of theories of horizontally and vertically divided and checked government in order to filter and dilute majority will. Madison believed that as long as the propertied minority enjoyed disproportionate influence in the political arena of the new Republic, they would guard against the folly of seeking to undermine the security of property rights.

Nedelsky points out that other strategies were available to Madison. Gouverneur Morris, who was less of a democrat than Madison, wanted to check not only the future propertyless majority but also the propertied elite. Otherwise, the danger of majority tyranny would be avoided only at the cost of minority tyranny. Madison was so focused on the danger of majority expropriation, however, that he gave insufficient attention to this possibility in 1787. James Wilson, on the other hand, was more optimistic about the future of democracy, and wanted to encourage greater participation in government by all citizens. Active participation would lead to a greater sense of responsibility, which in the long run would provide greater security for property. Obsessed with the image of the future majority as a hungry mob, Madison failed to consider this path as well, opting instead for a government structured to encourage political apathy. Thus, the Madisonian solution contained within it the seeds of what Nedelsky sees as the major failing of modern constitutionalism: its hostility towards measures designed to promote more equality and a more genuinely participatory democracy.

Nedelsky acknowledges but does not highlight two immediate difficulties in showing that Madison's political philosophy (as she has depicted it) played a dominating role in American constitutionalism. First, Madison's Malthusian premise turned out to be false. Although there has always been considerable inequality in property ownership in

America, the grim vision of a permanent propertyless majority never materialized (p. 331 n.188). Second, Madison's strategy for meeting the imagined Malthusian danger was never implemented in its intended form. The Convention rejected some Madisonian devices to ensure rule by a propertied elite — such as a property qualification for electors to the Senate (pp. 56-57, 303 n.5); others went by the board as the franchise and tenets of populist democracy expanded throughout the nineteenth and twentieth centuries.

Notwithstanding these difficulties, Nedelsky argues that "the primacy of the Federalist concern with protecting property so shaped the structure of the Constitution that it was characterized as much by this implicit priority as by the absence of its formal institutionalization" (p. 7). The Madisonian obsession lived on, she argues, largely through the development of the institution of judicial review. The Federalist judiciary divided the issues of public life into the conceptual realms of politics and law, granting themselves final say over the latter. Property rights, which enjoyed "the sanction of the long and honorable tradition of common law" (p. 8), quickly became a legally enforced limit on the power of democratic government. The phenomenon initially emerged through aggressive enforcement of the Contracts Clause[5] and later expanded through a *Lochner*-ized due process.[6] Ironically therefore, although Madison himself opposed judicial review (p. 59), it was the device through which his fear of majoritarian redistribution was perpetuated for the first 150 years under the American Constitution.

At this point in Nedelsky's story, another obvious difficulty develops: in the late 1930s the Court abandoned *Lochner,* and has made no systematic effort to revive it (at least with respect to property rights) since that time. While Nedelsky acknowledges this (p. 225), she argues that the Madisonian-Lochnerian legacy continues to rule us from the grave. In fact, she believes the preoccupation with protecting property against majoritarian redistribution has permanently "distorted" constitutional discourse in a number of ways. Because of the Madisonian legacy, we tend to think of constitutional rights as inherently unequal (like property) rather than capable of enjoyment by all (pp. 245-46). Additionally, Madison's efforts to impose filters on the vox populi through federalism and separation of powers generated our "shallow conception" of democracy (p. 1), minimizing the potential for participation in government by all segments of society. Finally, our chronic tendency to view private property as the paradigm of constitutional rights has stymied efforts to find a new foundation for constitutional protection of interests in personal autonomy — a

5. U.S. CONST. art. I, § 10.

6. *See* Lochner v. New York, 198 U.S. 45 (1905).

foundation that would be more congenial to claims of egalitarian redistribution (pp. 272-76).

II

Numerous problems beset Nedelsky's reconstruction of Madison's views about property and their influence on American constitutionalism.[7] Probably the principal defect is that she mistakenly conflates two very different positions regarding constitutional protection of property: (1) that specific rights in property should be protected against majority interference, and (2) that relative shares of general wealth should be insulated from collective redistribution. Madison clearly agreed with the former proposition, but I think it most unlikely that he would have endorsed the latter. By treating these two propositions as equivalent, Nedelsky has in effect transformed Madison into Stephen Field[8] — or Richard Epstein.[9] She has also erroneously portrayed what is in effect a minority position in American constitutional law (the Field-Epstein strict antiredistribution view) as the main line.

Without a doubt, Madison wanted to protect specific rights in property and contract. He endorsed the Contracts Clause — prohibiting the states from impairing the obligation of contracts — on the ground that it would help "inspire a general prudence and industry, and give a regular course to the business of society."[10] And he is generally credited as the author of the Takings Clause of the Fifth Amendment — barring the federal government from taking private property for public use without just compensation (p. 308 n.56). But no evidence exists that Madison harbored similar hostility toward measures that would redistribute relative shares of fungible wealth. Madison favored abolition of the entail in Virginia (p. 285 n.53) and

7. Two problems of misplaced emphasis should be briefly noted. First, Nedelsky gives insufficient attention to Madison's concerns about conflicts between different classes of property holders — debtor versus creditor, agrarian versus manufacturing, slaveholder versus independent farmer. These concerns probably weighed more heavily on his mind than any concerns about rich versus poor. *See, e.g.*, THE FEDERALIST NO. 10 (James Madison); James Madison, Draft Letter on Majority Governments Dated 1833, *reprinted in* MEYERS, *supra* note 3, at 521-30. Second, Nedelsky should have done more to acknowledge Madison's strong commitment to freedom of speech and religion as well as property. In this regard, I agree with Nedelsky that Madison's 1792 essay entitled *Property, id.* at 243, is uncharacteristic in defining property very broadly to include what we would call civil rights. But in asserting that every "man has a property in his opinions and the free communication of them," and "a property of peculiar value in his religious opinions, and in the profession and practice dictated by them," *id.*, Madison was making the point that freedom of speech and religion were just as important as the right to property. By downplaying Madison's commitment to these other rights, Nedelsky makes him seem excessively single-minded.

8. Justice Field was the foremost advocate of the doctrine of substantive due process in the period leading up to *Lochner*. *See* JAMES W. ELY, THE GUARDIAN OF EVERY OTHER RIGHT 86-87, 92, 99 (1992).

9. *See* RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

10. THE FEDERALIST NO. 44 (James Madison).

spoke favorably of other reforms in the laws of inheritance that would tend to equalize the distribution of property over time (p. 39). As Nedelsky admits, "[p]oor laws were common in most states, including Virginia, and we have some reason to believe that Madison approved of such institutions" (p. 44). She also quotes Madison as having once expressed the view that France could benefit from "a more equal partition of property" (p. 34).

More direct evidence of his attitude is provided by his 1792 essay *Parties,* where Madison wrote that the evil of party factions should be combatted by, among other things, "the silent operation of laws, which, *without violating the rights of property,* reduce extreme wealth towards a state of mediocrity."[11] Here we see Madison relying on the very distinction Nedelsky repeatedly ignores — between "rights of property" (not to be violated) and measures to reduce extremes in wealth (to be encouraged).

Perhaps the strongest reason to doubt Nedelsky's equating specific property rights with general wealth, however, is that it would have been illogical for Madison to oppose general wealth redistribution, given the premises of his political thought as Nedelsky portrays them. Madison believed in economic growth: he wanted a government that would encourage agricultural improvements, advances in manufacturing, and more trade and commerce, all of which he regarded as promoting the "public good" (pp. 42-43). Yet at several junctures in his life Madison also voiced a Malthusian pessimism: no amount of growth could keep up with the demands of a burgeoning population, so that over time more and more Americans would be without any property.

Given these twin premises — a belief that the size of the pie could be expanded together with a belief that the distribution of the pie would eventually become so skewed as to threaten the very fabric of society — Madison could not sensibly oppose all forms of redistribution. Instead, one would expect Madison to endorse *both* economic growth and wealth redistribution (as long as measures to achieve one goal would not frustrate the other), because both measures would work to postpone the day of the Malthusian Armageddon. The most plausible position for realizing this dual strategy would be to secure existing entitlements against retroactive impairment — thereby stimulating investment and economic growth — while encouraging measures that would work over time to promote greater equality in wealth. Nedelsky cites no evidence suggesting this was not in fact Madison's position.[12]

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11. P. 45 (quoting James Madison, *Parties, in* 6 THE WRITINGS OF JAMES MADISON 86 (Gaillard Hunt ed., 1906)) (emphasis added).

12. When listing examples of the evils of factions, Madison spoke of "a rage for paper money, for an abolition of debts, [or] for an equal division of property . . . ." THE FEDERALIST, *supra* note 7, at 112. But I would not equate "*an equal* division of property," i.e., pure socialism, with

By and large, our constitutional history has followed the same strategy: we protect specific contract and property rights against retrospective interference but do not recognize any permanent or general barriers to wealth redistribution. Consider, for example, the Contracts Clause. It is true, as Nedelsky argues, that the Federalist judiciary adopted an expansive interpretation of the Contracts Clause, reading it to cover much that could be regarded as property.[13] But in the watershed case of *Ogden v. Saunders,*[14] the Court limited the clause to the protection of previously negotiated contract rights, holding that it did not bar prospective legislation such as bankruptcy laws designed to mitigate hardship for future insolvent debtors. A reading of the Constitution that would proscribe all attempts at wealth redistribution would presumably reach the opposite conclusion.[15]

Similarly, Madison's Takings Clause has always been understood to apply only to interference with rights in specific property.[16] The Clause requires the government to pay just compensation when it condemns, seizes, or destroys identifiable property. It also requires just compensation when the government adopts a regulation of property that has the effect of "appropriating or destroying it."[17] But the Court has consistently rejected takings challenges to general price regulations,[18] zoning regulations,[19] or systems of taxation.[20] This is again contrary to what one would expect if the Constitution truly enjoined

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measures designed to achieve a "more equal" division, which Madison endorsed. Nedelsky also notes that Jefferson once wrote Madison proposing an equal division of property among siblings upon death of a parent and a system of progressive taxation, and that Madison did not reply. P. 33. She infers from Madison's failure to respond that he disapproved of these ideas, but she cites no direct evidence supporting such a conclusion. P. 285 n.51.

13. Pp. 194-95. *See* Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) (Contracts Clause prohibits state interference with completed grant of real property); Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) (Contracts Clause protects corporate charter).

14. 25 U.S. (12 Wheat.) 213 (1827). Nedelsky does not cite the case.

15. *See* Richard Epstein, *Toward a Revitalization of the Contract Clause,* 51 U. CHI. L. REV. 703, 723-30 (1984) (arguing that *Ogden* was wrongly decided and that prospective interferences with freedom of contract should be construed to violate the clause).

16. The Takings Clause has in fact been of limited significance throughout most of our history. The Supreme Court held in Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833), that the clause applied only to the federal government, and not until late in the nineteenth century did the Court find that the principles of the clause applied to the states through the Fourteenth Amendment. Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226, 239 (1897). Even as applied to the federal government, not until 1946 did the Court clearly establish that federal sovereign immunity had been waived for suits alleging a taking of property. United States v. Causby, 328 U.S. 256 (1946). *See* JOHN M. STEADMAN ET AL., LITIGATION WITH THE FEDERAL GOVERNMENT 225-26 (2d ed. 1983).

17. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922).

18. *See* Block v. Hirsch, 256 U.S. 135 (1921) (rent controls).

19. *See* Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

20. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (dictum); *cf.* United States v. Sperry Corp., 493 U.S. 52 (1989) (rejecting takings challenge to imposition of a user fee on persons litigating claims before the Iran-United States Claims Tribunal).

all forms of wealth redistribution.[21]

Even in the area of procedural due process protections for property, we see a similar pattern. In an important pair of cases decided early in this century, the Court held that a due process hearing was required where "[a] relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds."[22] But where the question involved establishing a general schedule of tax rates applicable to large numbers of similarly situated individuals, "[t]heir rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule."[23] Thus, the Due Process Clause, like the Contracts and Takings Clauses, applies to targeted intrusions, not wholesale redistribution.

To be sure, the substantive due process jurisprudence of *Lochner* can be seen as reflecting a general hostility toward redistributive legislation, even where the law operates prospectively and thus cannot be said to interfere with specific, preexisting entitlements. But *Lochner* had a much narrower scope of operation than is often assumed. For the most part, its theory was confined to statutes that precluded parties to a contractual relationship, such as employers and employees, from bargaining over specific terms.[24] Substantive due process was never applied to prohibit progressive taxation, public assistance laws, or any other general redistributive legislation. And even in the employer-employee context, the Court often upheld statutes where it perceived that employees did not enjoy equal bargaining power.[25] In any event, the *Lochner* era lasted only forty years and is now thoroughly repudiated.

In sum, Nedelsky significantly overstates the degree to which the Constitution, either in its original design or in its evolved understanding, has served to entrench the existing distribution of wealth. The main line in American constitutional history, from James Madison to the present, has been to offer a measure of constitutional protection for specific entitlements in property but not to freeze relative shares of wealth. By conflating these two positions, Nedelsky has painted a picture of a constitutional tradition far more hostile to egalitarian redis-

21. Richard Epstein, who believes that the Constitution ought to incorporate such a principle, accordingly argues that the Takings Clause should be construed to prohibit progressive taxation and other forms of redistribution. EPSTEIN, *supra* note 9, at 295-303.

22. Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 446 (1915) (characterizing the holding in Londoner v. Denver, 210 U.S. 373 (1908)).

23. 239 U.S. at 445.

24. *See* Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888-1921*, 5 LAW & HIST. REV. 249, 274 (1987) (describing tension between paternalism and anti-redistribution theme during *Lochner* era).

25. *E.g.*, Muller v. Oregon, 208 U.S. 412 (1908) (minimum hours for women); Holden v. Hardy, 169 U.S. 366 (1898) (minimum hours for miners).

tribution than the one we have. If Americans have not sought to legislate socialism, it is because the political consensus for such a solution does not exist. It is not because of the legacy of Mr. Madison or because of any legal barriers found in the Constitution.

III

If Nedelsky overstates the degree of constitutional protection given to property in the analytical portion of the book, she is guilty of understating the contributions of property when she puts an evaluative spin on that analysis in the concluding chapter. In common with other recent works on property rights by left-leaning American academics,[26] Nedelsky's normative analysis is concerned exclusively with issues of distributive justice — how we cut the pie. Nedelsky ignores the possibility that the institution of private property might have something to do with the size of the pie, and hence with the well-being of those who receive even the smallest slices, whatever the distributional principle. In effect, she evaluates the Madisonian legacy (in the overblown form in which she presents it) against an implicit assumption of a zero-sum society. Not surprisingly, a private property regime looks quite unfair on such assumptions: those with property get much larger slices of the pie than those without, just because they already have property. The only decent thing to do is to start redistributing.

This focus on distributive justice gives rise to a number of ironies. One is that Madison and his compatriots surely did not believe in a zero-sum society, as Nedelsky herself admits (p. 42). Indeed, in the analytical part of the book, Nedelsky acknowledges that Madison wanted to protect property in part to promote economic growth — what he called the "public good." The Madison we encounter in the analytical pages is a complex figure who believes in an expanding pie but frets about a Malthusian future in which a majority hold only minuscule slices. When it comes to evaluating the Madisonian legacy, however, the pro-growth theme drops from sight and we are left with nothing but the demand of a minority (the rich) for protection against a majority (the poor). Needless to say, in a such zero-sum world it is hard to find kind words for a Constitution that forbids any redistribution of wealth.

At only one point in the book does Nedelsky seek to justify her disregard of the wealth-generating potential of private property. She acknowledges that if Madison were right about the sanctity of private property as necessary to "promote the public good of all," then "most of the criticisms I have outlined would fall or at least pale before them" (p. 168). In reply to this challenge, she asserts that in order to

26. *See, e.g.*, STEPHEN R. MUNZER, A THEORY OF PROPERTY (1990); JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY (1988). I make a similar point about Munzer's work in Thomas W. Merrill, *Wealth and Property*, 38 UCLA L. REV. 489, 495 (1990) (book review).

believe Madison was right, "[w]e must accept *both* the claim that attempts at redistribution will make those at the bottom worse off *and* the claim that they will not be capable of seeing this 'truth' for themselves. If either claim fails, the moral foundation for Madisonian elite rule crumbles" (pp. 168-69). This response rests on the same equivocation previously noted: Nedelsky equates Madison's support for specific investments in property (needed to promote "the public good," i.e., a larger pie) with a policy against all wealth redistribution. To imagine that "those at the bottom" are made worse off by progressive rates of taxation and transfer payments, *and* that they cannot see this themselves, is indeed implausible. But this does not mean that "those at the bottom" would be better off if we abolished private property or even if we did away with the Due Process and Takings Clauses. The poorest Americans may not want to eliminate redistribution, but they are not lining up to flee to Cuba either.

Which brings me to a second irony. Shortly after Nedelsky published her book, private property had the best year in its history. During 1991, the world watched transfixed as the former communist states of eastern Europe turned from collectivist to market-oriented regimes and then communist rule collapsed even in the Soviet Union. The phenomenon of a capitalist revolution would be utterly unfathomable to one whose understanding of private property was limited to a study of Nedelsky's book. Implicit in Nedelsky's account of our own experience is that democratic majorities in America, if liberated from the "distorting" effects of a Madisonian constitutional heritage, would opt for a more collectivist and egalitarian society. One schooled on this premise would predict that if democratic majorities in other countries — countries happily spared from these "distorting" influences — were suddenly freed from a dominating occupational force, they would adopt as their first priority guidelines for the proper distribution of wealth.

Not so. They want private property. Indeed, at least some of them want to make property a constitutional right.[27] The reasons for this are hardly obscure. A system of private property promises more goods, more jobs, more variety, more recreational and associational choices, more attractive communities, more economic growth — in a word, a larger pie.[28] The former communist regimes want private property for all the reasons Nedelsky ignores in the latter part of her book. This does not mean the Commonwealth of Independent States and the new republics of eastern Europe will replicate the same distri-

27. *See, e.g.,* Wiktor Osiatynski, *Revolutions in Eastern Europe,* 58 U. CHI. L. REV. 823, 824 (1991) (noting that Poland, Hungary, and the Czech and Slovak Republic have begun to return property confiscated 45 years ago); Symposium, *Panel I: Property Rights and the New Legal Order,* 21 CUMB. L. REV. 447, 448-51 (1991) (panel discussion) (comments of Pavel Bratinka).

28. *See* EPSTEIN, *supra* note 9, at 3-6.

bution of wealth or the same balance between public and private sectors found in the United States. But as I have argued, the choice of a private property regime is to a significant degree independent of decisions about the distribution of wealth. Madison would have understood last year's events very well. Nedelsky must be utterly mystified.

IV

The ultimate message of Nedelsky's book is that private property is a social institution, collectively defined and collectively enforced. She believes the concept of property as something natural and prepolitical and immune from ordinary democratic processes is at best incoherent and at worst pernicious. The idea that property has some timeless, "correct" definition that courts can ascertain and enforce against the popular will is belied by the fact that the idea of property has "disintegrated."[29] And attempts throughout our history to insulate property from majoritarian processes — whether Madison's design for a structural Constitution that would ensure rule by the propertied elite or *Lochner*'s strategy of a judicially enforced protective boundary around property rights — have only "distorted" the process of collective self-determination, preventing the people from defining this social institution in the way they mutually conclude to be for the best of all.

Property is of course a social institution, not a natural right. But there is no inherent contradiction, as Nedelsky seems to believe there is, between the idea that property is a social institution and the idea that the law — another social institution — should protect reliance interests associated with specific property rights. Property is a social institution in the sense that it emerges from customary forms of interaction among people with respect to specific material resources,[30] and

29. The idea that the concept of private property has "disintegrated" plays only a marginal role in Nedelsky's book, and hence warrants only a footnote. Nedelsky borrows this conceit from Thomas Grey, *The Disintegration of Property, in* XXII NOMOS: PROPERTY 69 (J. Roland Pennock & John W. Chapman eds., 1980), and supports it with reference to Frank Michelman's discussion of the Supreme Court's all-things-considered understanding of the distinction between a regulation and a taking of property. Frank Michelman, *Takings, 1987,* 88 COLUM. L. REV. 1600 (1988). But the fact that there are hard cases at the margins of the takings doctrine hardly supports the claim that a legal institution has "disintegrated." Private property, in the everyday sense of the right to possess, exclude others, and transfer identified material resources, is nonproblematic in the vast majority of transactions in which the concept is applied.

The notion that property has "disintegrated" is also belied by Nedelsky's own theory that "the image of property as natural, neutral, and apolitical or 'nonstate-like' " continues to define what counts as governmental interference and "who will get constitutional protection for what." Pp. 259-60. In effect, Nedelsky tries to have it both ways. She argues that property has disintegrated and thus cannot serve as a judicially defined boundary. But at the same time she believes that property continues to have a "mythic power" that defines the boundaries of political discourse. P. 246. If property did not continue to reflect some commonsense core of meaning, it could hardly continue to exert such a powerful influence over the legal mind.

30. *See* ROBERT ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 167-68 (1991) (reviewed in this issue by Professor David Friedman. — Ed.); John Umbeck, *A Theory of Contract Choice and the California Gold Rush,* 20 J. LAW & ECON. 421 (1977); *cf.* Harold Demsetz, *Toward a Theory of Property Rights,* 57 AM. ECON. REV. 347 (1967) (describ-

then is defined and protected against private interference by state law.[31] The constitutional protection of property is also a social institution, but it involves a different source of law (the federal Constitution rather than state law), different institutional actors (ultimately the federal courts), and different objectives (protecting specific entitlements against public rather than private interference). Thus, the fact that both processes are "social" does not mean that they collapse into a single undifferentiated mass. Moreover, neither the social origins of property as an institution, nor the social nature of the constitutional protections we recognize, tells us much about what collective measures may be adopted (at either the state or the federal level) to reallocate relative shares of fungible wealth. We are fortunate that the Founders of our nation, most prominently James Madison, understood these distinctions. What is puzzling is that so many contemporary American academics would like to obscure them.

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ing an economic theory of why informal property rights emerge in primitive societies in response to external changes that effect the value of material resources).

31. *See* Board of Regents v. Roth, 408 U.S. 564, 577 (1972).